

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Kevin Callwood,)	
)	
)	
Plaintiff,)	
)	Civil No. 1997-67
v.)	
)	
United States of America,)	
)	
Defendant.)	
_____)	

APPEARANCES:

Leonard B. Francis, Jr., Esq.

St. Thomas, U.S.V.I.

Alvin E. Entin, Esq.

Fort Lauderdale, FL.

For the plaintiff,

Nelson L. Jones, AUSA.

St. Thomas, U.S.V.I.

For the government.

MEMORANDUM

Gomez, J.

Before the Court is a motion for a new trial filed by Kevin Callwood pursuant to 28 U.S.C. § 2255. For the reasons set forth below, the motion will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Kevin Callwood was charged in a three-count amended information with first degree felony murder, first degree

robbery, first degree assault, and the possession of a deadly weapon during the commission of a crime of violence. On May 4, 5, and 6, 1992, Callwood was tried on those charges in this Court before a jury of his peers.¹ On May 6, 1992, the jury returned guilty verdicts on all counts alleged in the amended information. On direct appeal, the Court of Appeals for the Third Circuit affirmed the petitioner's conviction. *United States v. Callwood*, 983 F.2d 1050 (3d Cir. 1992) (table order).² Callwood was subsequently sentenced to a term of mandatory life imprisonment without the possibility of probation or parole.

On April 21, 1997, Callwood filed a motion for a new trial pursuant to 28 U.S.C. § 2255. At the time of his filing, Callwood was represented by an attorney barred in the state of Florida, but had not obtained local counsel. Consequently, his motion for a new trial failed to comply with Rule 83.1(3) of the Local Rules of Civil Procedure, which forbids a non-local counsel from filing any pleadings with the Court until he or she has been admitted *pro hac vice*. Due to Callwood's non-compliance with Rule 83.1(3), on May 23, 1997, the Court entered an order

¹ The Honorable John P. Fullam, United States District Judge, sitting by designation, presided over the trial.

² There is no evidence in the record of Callwood further pursuing his appeal by filing a certiorari petition with the United States Supreme Court.

directing Callwood to resubmit his motion *pro se* or obtain local counsel. The Court's order also informed Callwood that his defectively filed motion would be stricken from the record.³

On January 30, 1998, Attorney Leonard Francis, who was at that time barred in the United States Virgin Islands, entered an appearance in this matter on behalf of Callwood. That same day, Attorney Francis re-filed the same motion for a new trial that Callwood had previously filed via his Florida attorney. On March 31, 1998, the government filed a responsive pleading opposing Callwood's motion for a new trial.

II. ANALYSIS

Callwood presents two primary arguments in favor of his motion for a new trial. First, he argues he should be granted a new trial pursuant to 28 U.S.C. § 2255 because he was denied his Sixth Amendment right to effective assistance of counsel. Second, he claims he was denied his Fifth Amendment right to due process and a fair trial. These arguments are addressed individually below.⁴ At the outset, however, the Court will

³ The motion is still docketed in this case.

⁴ When a prisoner files a habeas corpus motion pursuant to 28 U.S.C. § 2255, this Court is required to promptly grant the prisoner an evidentiary hearing on the matter unless the "motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief." *Id.* The Court has exercised its discretion to not hold a hearing in this matter, as it is convinced the record conclusively shows the petitioner is not entitled to

consider whether Callwood's motion was timely filed.

A. The Timing of Callwood's Petition

The amendments to 28 U.S.C. § 2255, which were enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA"], Pub. L. 104-32, § 105, establish a one-year limitation period for filing § 2255 petitions, running from the latest of four dates specified in the statute. However, the United States Court of Appeals for the Third Circuit has held this one-year limitation period does not apply to § 2255 petitions filed on or before April 23, 1997. *See Burns v. Morton*, 134 F.3d 109, 112 (3d Cir. 1998) ("[Section] 2255 motions filed on or before April 23, 1997, may not be dismissed for failure to comply with § 2255's one-year period of limitation.").

Callwood initially filed his § 2255 motion via his Florida attorney on April 21, 1997, three days before the AEDPA deadlines became effective. That motion, which was defectively filed, was corrected on January 30, 1998, when local counsel entered an appearance on the petitioner's behalf and re-filed the same § 2255 motion that had been filed on April 21, 1997.

Thus, the question presented to the Court is whether Callwood's motion should be considered as having been filed on

relief. *See United States v. Williams*, 615 F.2d 585, 591 (3d Cir. 1980) (noting that whether to grant an evidentiary hearing is committed to the sound discretion of the trial court).

April 21, 1997, or January 30, 1998. The question is a critical one because if Callwood is deemed to have filed his petition on the latter date, the AEDPA deadlines would apply and bar the filing of his motion. See *Morton*, 134 F.3d at 112 (providing § 2255 petitioners whose conviction became final before the enactment of the AEDPA with one full year, running from April 24, 1996, to file their petitions). The statutory language of § 2255 provides no guidance, as it states merely that the petitioner "may move the court" within the prescribed time limits, but does not specify whether a defectively-filed motion satisfies the filing deadline requirement. The Court is also unaware of any case by the United States Court of Appeals for the Third Circuit answering this question.

Given the lack of authority directly on point, the Court is guided more generally by principles of equity in deciding that Callwood's petition should be deemed filed on April 21, 1997, for purposes of the AEDPA filing deadlines. Cf. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (noting that equitable tolling is available "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period"). Several factors compel this decision. First, as he was incarcerated at the time, Callwood was restricted in his ability to monitor whether his Florida-based

counsel followed this jurisdiction's Local Rules of Civil Procedure. Second, Callwood should not be faulted for his Florida-based counsel's neglect, especially considering that Callwood was diligent in obtaining local counsel and resubmitting the motion. Accordingly, the Court is compelled by principles of equity to consider the merits of Callwood's petition.

B. Ineffective Assistance of Counsel Claim

Callwood argues that he should be granted a new trial in part because he was denied his Sixth Amendment right to effective assistance of counsel. In order to show ineffective assistance of counsel, Callwood bears the burden of meeting the two-part standard enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984); see also *United States v. Baynes*, 622 F.2d 66, 69 (3d Cir. 1980) ("The defendant bears the burden of proof to demonstrate ineffective assistance of counsel."). First, Callwood must show that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Second, Callwood must show that he was prejudiced by counsel's conduct in that there is a "reasonable probability" that the deficient assistance of counsel affected the outcome of his trial. *Id.* at 694-95.

As to the first requirement, Callwood would have to overcome a "strong presumption that the counsel's conduct falls within the

wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* He has failed to overcome that presumption. Callwood was represented at trial by George Marshall Miller, Esq. ["Atty. Miller"]. In his petition, Callwood argues Atty. Miller's representation was unreasonable because Miller failed to cross-examine two government witnesses regarding cooperation agreements those witnesses allegedly had with the government. (Mot. at 4, 10.) In opposition, the government contends that the two witnesses -- Frances John-Baptiste and Gloria Correa -- had not entered into cooperation agreements with the United States. (Opp'n at 3.) Rather, according to the government, after John-Baptiste and Correa provided their incriminating statements, they received money from the Virgin Islands Police Department to leave the territory due to security concerns. (*Id.* at 3-4.)

The record shows that on cross-examination Atty. Miller questioned Correa and John-Baptiste regarding money they received from the Virgin Islands Police Department.⁵ (Trial Tr., Vol. I. at 56-58, 129.) The following exchange took place between Atty.

⁵ The government also raised the issue of the witnesses' payments on direct examination. (Trial. Tr., Vol. I. at 65, 133-134.)

Miller and Correa on cross-examination:

Atty. Miller: Had the police paid you any money following the 11th June, 1991?

Correa: Yeah.

. . .

The Court: What was the money for?

Correa: Oh, the money was for - I was pregnant about then and the money was to help me to get my kid's clothes.

Atty. Miller: Did they give you money on more than one occasion after June 11, 1991?

Correa: Yes.

Atty. Miller: And were those payments made before or after you testified in the first trial last January in connection with the death of Maurice David?

Correa: This was before the trial came up.

The Court: You had some more money after the trial?

Correa: Yes.

Atty. Miller: And how much money all together have you received from police in connection with this incident?

Correa: I can't remember.

The Court: Can you give us your best shot? What is your best guess? It was a million dollars. Was it a hundred dollars? Was it something in between?

Correa: Fourteen hundred dollars.

(Trial. Tr., Vol. I. at 56-58.)

Additionally, the following exchange occurred between Atty. Miller and John-Baptiste on cross-examination:

Atty. Miller: Now, you testified that earlier that the police had given you money in connection with this case. My question is, how much all together have you been paid?

John-Baptiste: A thousand dollars.

The Court: How much?

John-Baptiste: One thousand dollars.

The Court: One thousand dollars.

Atty. Miller: Was this payment made to you before you testified at the January trial?

John-Baptiste: Before I testified in?

Atty. Miller: Yes.

John-Baptiste: Yes.

(*Id.* at 129.)

The above-quoted portions of the trial transcript belie Callwood's claims that his attorney did not investigate Correa and John-Baptiste's relationship with the government. The testimony also completely contradicts Callwood's argument that Atty. Miller did not challenge their testimony. As such, the Court finds that Callwood has not established that Atty. Miller's representation was flawed, let alone so inadequate that it fell outside of "the range of competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56-57 (2003);

see also *United States v. Kauffman*, 109 F.3d 186, 189 (3d Cir. 1997) (stating that "[a] court must be highly deferential to counsel's decision and there is a strong presumption that counsel's performance was reasonable").

Turning to the second question involved in addressing Callwood's ineffective assistance of counsel argument, the Court finds that Callwood has not demonstrated he was prejudiced by his attorney's conduct. "To establish prejudice, a defendant must demonstrate that there is a 'reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Weeks v. Snyder*, 219 F.3d 245, 257 (3d Cir. 2000) (quoting *Strickland*, 466 U.S. at 694.) Here, Callwood cannot show he was prejudiced, because there is no evidence in the record that his counsel acted unprofessionally. Accordingly, Callwood has not satisfied either of the two essential elements of an ineffective assistance of counsel claim, and the Court will deny his request for a new trial on that ground.

C. Due Process And Fair Trial Claim

Callwood also argues that he was "denied his constitutional rights to due process and a fair trial through the Government's failure to disclose the existence of cooperation agreements between the Government and their key witnesses in the case."

(Mot. at 12.) Callwood claims that the government's alleged failure to disclose this information constituted a *Brady* violation because he was "wholly unable to combat the testimony of Batiste [sic.] and Carrera [sic.]." (Mot. at 16.) See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that due process requires the prosecution to disclose evidence favorable to an accused upon request when such evidence is material to guilt or punishment).

Again, the record undercuts Callwood's claim. The above-quoted portions of the trial transcript indicate that the government disclosed the information regarding its payments to John-Baptiste and Correa, thereby prompting Callwood's attorney to specifically question the witnesses about these payments. Moreover, Callwood offers no evidence that what he describes as a "cooperation agreement" between the government and the witnesses was anything more than post-statement payments they received for security reasons.⁶ As Callwood has not demonstrated that the government failed to abide by its obligation under *Brady* to disclose potential impeachment evidence, the Court will reject his fair trial argument. See *United States v. Pelullo*, 399 F.3d 197, 209 (3d Cir. 2005) (stating that, "[t]o establish a due

⁶ On direct examination, both John-Baptiste and Correa provided testimony supporting the government's claim that the payments were made for security purposes. (Trial Tr., Vol. I at 65, 133-134.)

process violation under *Brady*, a defendant must [first] show that . . . evidence was suppressed").

III. CONCLUSION

For the foregoing reasons, Callwood has not convinced the Court that Attorney Miller inadequately represented Callwood at trial, or that Callwood's right to a fair trial was violated. Accordingly, the Court will deny Callwood's § 2255 motion for a new trial. An appropriate order follows.

ENTERED this 10th day of June, 2005.

FOR THE COURT:

_____/s/_____
Curtis V. Gómez
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

Hon. G.W. Barnard
Leonard B. Francis, Jr., Esq.
Nelson L. Jones, AUSA
Mrs. Schneider
Mrs. Trotman
Jeff Corey

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For the plaintiff,

Nelson L. Jones, AUSA.

St. Thomas, U.S.V.I.

For the government.

ORDER

Gomez, J.

For the reasons stated in the accompanying memorandum of
even date, it is hereby

ORDERED that the plaintiff's motion for a new trial is
denied.

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Civil No. 1997-67
Order
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ENTERED this 10th day of June, 2005.

FOR THE COURT:

_____/s/_____
Curtis V. Gómez
District Judge

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WILFREDO MORALES
Clerk of the Court

By: _____/s/_____
Deputy Clerk

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